

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DEAN & FLYNN, INC., et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil No. 97-0149-B
	)	
DIVERSIFIED COMMUNICATIONS,	)	
	)	
Defendant	)	

***RECOMMENDED DECISION***

This is an action alleging defamation and commercial disparagement by Plaintiffs Dean & Flynn, Inc., and Uptown Festivals, operators of the carnival at the Bangor State Fair, and Holly Cote, an employee at the fair, against Defendant Diversified Communications, which operates a local television station. Plaintiffs complain about a particular news story broadcast on Defendant's station that reported there was an increase in inquiries at the local public health clinic from people concerned they might have contracted sexually transmitted diseases ["STDs"] from persons working at the fair. The report also indicated employees of the clinic have spent extra work hours trying to track down fair workers who might have contracted STDs.

Defendant seeks judgment as a matter of law on several preliminary legal issues.

***1. Whether Plaintiffs Dean & Flynn, Inc. and Uptown Festivals USA are "public figures."***

Defendant correctly notes that "public figures" are required to prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence in order to prevail on a defamation claim. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); Rest. (Second) Torts, § 580A. A plaintiff is a public figure for purposes of the *Gertz* analysis either because he or she "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" or

because he or she "injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351.

Defendant argues in this case that the corporate Plaintiffs<sup>1</sup> are public figures by virtue of the fact that "they . . . seek out and invite the public's attention by promoting themselves and trying to persuade residents of the Greater Bangor Area to like them and do business with them each year." Def. Memo. at 7. Defendant further notes the amounts expended by Plaintiffs annually for self-promotion. These factors alone, however, do not render Plaintiffs general purpose public figures under *Gertz*, which requires clear evidence that Plaintiffs have attained a position "of such persuasive power and influence" in this community that they hold a place of "special prominence in the resolution of public questions." *Gertz*, 418 U.S. at 345, 352. Accordingly, Defendant can only prevail on this question if Plaintiffs can be viewed as limited purpose public figures under *Gertz*.

To make the determination whether Plaintiffs are limited purpose public figures, the Court is required to analyze "the nature and extent of [their] participation in the particular controversy giving rise to the defamation." *Id.* at 252. Plaintiffs' advertising expenditures and other evidence of their desire to seek public attention are only relevant to this analysis to the extent it directly relates to the subject matter of the defamation. *Eg.*, *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 687 (4<sup>th</sup> Cir. 1989) ("Central to our conclusion [in *National Found. for Cancer Res. v. Council of Better Bus. Bur.*, 705 F.2d 98 (4<sup>th</sup> Cir. 1983)] was both the presence of extensive advertising . . . and a direct relationship between the promotional message and the subsequent defamation."). This is so because "the particular controversy giving rise to the

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<sup>1</sup> There is apparently no dispute that Plaintiff Holly Cote is not a public figure.

defamation" must have existed *prior* to the defamation. *Bruno & Stillman, Inc. v. Globe Newspaper*, 633 F.2d 583, 591 (1<sup>st</sup> Cir. 1980). As the First Circuit Court noted, "[t]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)).

In this case no public controversy existed prior to Defendant's broadcast of the allegedly defamatory report. Under these circumstances, Plaintiffs cannot be held to have "thrust [themselves] into the vortex of [a] public issue." *Gertz*, 418 U.S. at 352. Plaintiffs are therefore not public figures for purposes of their defamation claims.

## **2. *Whether Defendant is entitled a conditional privilege.***

Maine Law recognizes conditional privileges that arise in situations where "an important interest of the recipient of a defamatory statement will be advanced by frank communication." *Riplett v. Bemis*, 672 A.2d 82, 87 (Me. 1996) (citing *Lester v. Powers*, 596 A.2d 65, 70 (Me. 1991)). These situations are broadly set forth in the Restatement, (Second), of Torts, sections 594 through 598A. Defendant does not refer specifically to any of the Restatement sections. The one most applicable, in the Court's view, provides in its entirety as follows:

- (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
  - (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
  - (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
- (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that
  - (a) the publication is made in response to a request rather than volunteered by the publisher or
  - (b) a family or other relationship exists between the parties.

Rest (2d) Torts, § 595.

Defendant's attempt to argue that its broadcast is a conditionally privileged communication is to no avail. In *Lester*, a tenure review process was held to give rise to a conditional privilege afforded those asked to submit statements regarding the tenure candidate. *Lester*, 596 A.2d at 67. This is a classic example of a communication made to a defined group of recipients, who specifically requested the communication, under circumstances where the information affects an important interest of at least one third person. That can hardly be said of a broadcast to the entire community regarding an increase in persons seeking assistance at the local STD clinic at the time of the Bangor State Fair.

**3. *Whether the communication involved a matter of public concern.***

Defendant seeks a determination that the subject matter of the alleged defamation was a matter of public concern. Defamatory words spoken on matters of public concern do not give rise to presumed or punitive damages unless they are spoken with actual malice. *Levinsky's, Inc. v. Wal-Mart Stores*, 1997 WL 586992 (1<sup>st</sup> Cir. Sept. 26, 1997). The term "actual malice" has been defined as "knowledge of falsity or reckless disregard for the truth." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 751 (1985). The issue is a question of law. *Levinsky's*, at \*9.

Plaintiffs concede, and the Court agrees, that a news broadcast regarding an increase in public concern about a health issue, and the expenditure of public resources necessary to address it, involves a matter of public concern. It is clear to us that the subject may be "'fairly considered as relating to any matter of political, social, or other concern to the community,'" as opposed "'matters only of personal interest.'" *Id.* at \*9 (quoting *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)). This is particularly true in light of the fact that "the relevant community need not be very large and the

relevant concern need not be of paramount importance or national scope." *Id.* The subject matter at issue in this case is properly characterized as one of public concern.

**4. *Whether Defendant is entitled to a privilege of neutral reportage.***

Defendant concedes that no court in this jurisdiction has adopted the "neutral reportage privilege," first set forth in *Edwards v. National Audubon Soc.*, 556 F.2d 113 (2<sup>nd</sup> Cir. 1977).<sup>2</sup> The privilege was stated in *Edwards* as follows:

[W]hen a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. . . . What is newsworthy about such accusations is that they were made.

*Edwards*, 556 F.2d at 119 (citations omitted).

As originally stated, the privilege seems to require that the person defamed be a public figure, and most courts have so held. *Eg.*, *Crane v. Arizona Republic*, 729 F. Supp. 698, 710 (C.D. Cal. 1989) (passing on the need to determine whether California has adopted the privilege because the plaintiff in that case was a private figure, thereby making the privilege inapplicable). In fact, this Court has found only one case where the privilege was held to apply despite the fact that plaintiff was a private figure. *April v. Reflector-Herald*, 546 N.E.2d 466 (Ohio Ct. App. 1988). Because we have concluded that Plaintiffs are not public figures, the privilege would not apply in this case even if it had been adopted in Maine.

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<sup>2</sup> Defendant's suggestion that *Medina v. Time, Inc.*, 439 F.2d 1129 (1<sup>st</sup> Cir. 1971) implies the First Circuit would do so is unpersuasive. *Medina* involved the question whether Defendant's reporting was neutral for purposes of analyzing whether the report was published with "actual malice." As one court noted, this case is "not generally regarded as adopting a constitutional privilege of neutral reportage." *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1123 n.15 (N.D. Cal. 1984).

In addition, the privilege protects the accurate reporting of charges made by others that are newsworthy, not necessarily for their content, but for the very fact that they were made. Defendant's assertion that what was newsworthy about the charges in this case is the fact that they were made by an official at the public health clinic is not persuasive. The broadcast did not concern the fact that charges were being leveled at local businesses, but rather the substance of the charges, that there was increased traffic at the health clinic during fair season. The Court should conclude that no privilege of neutral reportage applies in this case.

**5. *Whether Plaintiffs should be limited to proof of actual damages.***

Defendant asserts that plaintiffs "who do not prove knowledge of falsity or reckless disregard for the truth" are limited to compensation for actual injury, and may not receive presumed or punitive damages. Def. Memo. at 6, citing *Gertz*, 418 U.S. at 349. Defendant is only partially correct, however. The ruling in *Gertz* has been held to apply for private figure plaintiffs only when the subject matter of the alleged defamation involves a public concern. *Dun & Bradstreet*, 472 U.S. at 761. Because this case does involve a matter of public concern, Defendant is correct that Plaintiffs will be limited to actual damages unless they show actual malice. However, Defendant makes no attempt to apply this rule of law to the facts of this case. It simply seeks a legal ruling from the Court entering judgment for Defendant on any claim for presumed or punitive damages. Such a ruling is inappropriate in the absence of a showing that no genuine issue of material fact exists relevant to this question.

***Conclusion***

For the foregoing reasons, I hereby recommend the Court GRANT Defendant's Motion for Summary Judgment on Preliminary Legal Issues only to the extent Defendant seeks a ruling that the

subject matter of the alleged defamation in this case involved a matter of public concern. In all other respects, I recommend the Motion for Summary Judgment on Preliminary Legal Issues be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on April 21, 1998.